RECENT CASES

Evidence—Self-Incrimination Privilege Applied to Truckdrivers' Time Cards—A statute made it a misdemeanor for truckdrivers to drive over ten hours in a fourteen-hour period, requiring that such drivers keep a record of their hours and providing that a failure to produce such record on the demand of a pubic officer was presumptive evidence of a violation of the statute.[1] On prosecution of the defendant under the statute, he objected to the admission of his time card into the evidence as denying him his constitutional right against compulsory self-incrimination.[2] *Held* (one judge dissenting),[3] the document of itself contained nothing incriminatory, as the alleged criminal act was not in filling out the time card but voluntarily continuing to drive after the entries were made. *People v. Creeden*, 281 N. Y. 413, 24 N. E. (2d) 105 (1939).

The enthusiasm of the courts in upholding the individual's privilege not to incriminate himself[4] by oral or written[5] testimony has not precluded its limitation. Thus it has been held that the documentary evidence sought to be excluded must be personal to the one claiming the privilege.[6] For this reason public books and corporation records are declared to be beyond the scope of the right.[7] Similarly, the admission of records required to be kept by those engaged in particular occupations or businesses has been allowed over the defendant's objection.[8] By analogy to these cases the constitutionality of the instant statute could be sustained. But on what theory or reason these cases rest is not quite clear. It can hardly be denied that a record which the witness or defendant has himself written is self-incriminative when, as testimony, it is sufficient of itself

1. N. Y. LABOR LAW (Supp. 1939) § 167.

2. U. S. CONST. Amend. V, ". . . no person shall be . . . compelled, in any criminal case, to be a witness against himself. . . ." Similar provisions have been enacted into the state constitutions. See for example, N. Y. CONST. art. I, § 6.

3. One peculiar inconsistency of fact, brought out in the dissenting opinion of Rippey, J., at 108, should be noted here. The full trial record was included in the majority opinion. In it, it appears that the arresting officer testified he had no knowledge of how long the defendant was driving except from the entries on the defendant's time card. He also stated that the defendant had been driving for eleven hours. But if the entries on the time card are examined, defendant appears to have driven only nine and one-half hours. The time of arrest was not given in the officer's testimony. So the majority affirmed the defendant's conviction on the officer's conclusion.

4. "These constitutional and statutory provisions have long been regarded as safeguards of civil liberty, quite as sacred and important as the privileges of the writ of habeas corpus or any of the other fundamental guaranties for the protection of personal rights." People *ex rel.* Taylor v. Forbes, 143 N. Y. 219, 227, 38 N. E. 303, 305 (1894). See also People v. Newmark, 312 Ill. 625, 144 N. E. 338 (1924).

See a criticism of judicial favor of this privilege in 4 WIGMORE, EVIDENCE (2d ed. 1923) 829; Rapacz, *Limiting the Plea of Self-Incrimination and Recent Enlargement of the New York Immunity Statutes* (1932) 20 GEO. L. J. 329, 352 *et seq.*

5. The leading American case holding that the privilege applied equally to oral and documentary evidence is Boyd v. United States, 116 U. S. 616 (1886).

6. 1 WHARTON, CRIMINAL EVIDENCE (11th ed. 1935) 608. See Corwin, *The Supreme Court's Construction of the Self-Incrimination Clause* (1930) 29 MICH. L. REV. 3, 16.

7. Wilson v. United States, 221 U. S. 361 (1911); Vaughn v. State, 17 Ala. App. 383, 84 So. 879 (1920); People v. Coombs, 158 N. Y. 532, 53 N. E. 527 (1899); People v. Zimmerman, 213 App. Div. 414, 210 N. Y. Supp. 269 (4th Dep't 1925), *aff'd*, 241 N. Y. 405, 150 N. E. 497 (1926).

8. People v. Shuler, 136 Mich. 161, 98 N. W. 986 (1904); State v. Davis, 117 Mo. 614, 23 S. W. 759 (1893). *Contra:* People *ex rel.* Ferguson v. Reardon, 197 N. Y. 236, 90 N. E. 829 (1910).

to convict the author of a crime;[9] and imposing a fine for the failure to produce it would seem to be the compulsion the privilege was designed to prevent.[10] Some authorities attempt to reconcile the inconsistency in the manner of the instant court, holding that the statute does not compel self-incrimination since it requires only that the entries be made; whether there will be a crime or not is the choice of the author.[11] But it is submitted that this rationalization is fallacious in that the statutes not only require that the entries be made by a particular class of persons, but also demand that the entries be disclosed.[12] While, as the authorities conclude, the statute does not compel one to incriminate himself in making the entry, they do compel him to disclose the crime after it has been committed, and thereby incriminate himself. Furthermore, it is not necessary that the fact withheld under the privilege be the crime itself, but merely that it be of such a nature as to tend to incriminate the defendant.[13] By this analysis compelling the defendant truck driver in the instant case to make out the time card and produce it on demand, would seem to be a clear abrogation of his constitutional privilege. Since investigation of the logical effect of the statutes fails to justify the result attained by the instant court, perhaps the decision is best explained by the court's desire to sustain what it believes to be a reasonable regulation of highway traffic.[14]

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9. See note 3 *supra*.

10. To be within the privilege the evidence must note have been voluntarily offered by the witness or defendant. Johnson v. United States, 228 U. S. 457 (1912); Dier v. Banton, 262 U. S. 147 (1923); 1 WHARTON, CRIMINAL EVIDENCE (11th ed. 1935) 606. *Cf.* Ross v. State, 204 Ind. 281, 182 N. E. 865 (1932).

Wigmore states that to be within the privilege the documents must have been compelled to have been produced by *"process treating him as a witness"*. WIGMORE, *op. cit. supra* note 4, at 864, 865. See also United States v. Mulligan, 268 Fed. 893 (N. D. N. Y. 1920); Wartels and Pollitt, *A Critical Comment on the Privilege Against Self-Crimination* (1929) 18 KY. L. J. 18, 22.

11. Instant case at 107. 4 WIGMORE, *op. cit. supra* note 4, at 855.

12. If the statutes required the entries to be made and nothing more, they would not, of course, be compelling self-incrimination. But in requiring that they be entered, they require that the entries be disclosed. This may or may not be self-incrimination depending on whether or not a crime has been committed.

Note that Wigmore states the rule, ". . . *there is no compulsory self-incrimination in a rule of law which merely requires beforehand a future report on a class of future acts* . . . ." 4 WIGMORE, *op. cit. supra* note 4, at 855. By using the word "merely" the rule as stated is correct in that no disclosure is required. But this is not the full force of the statutes, see *supra*. See MORGAN AND MAGUIRE, CASES ON EVIDENCE (1934) 251n.

13. 3 ABBOTT, TRIAL EVIDENCE (4th ed. 1931) 1178. Despite the fact that the evidence was taken wholly from the time card and the examination of the arresting officer, see note 3 *supra*, the court in the instant case stated that the time card did not incriminate because conviction required the testimony of the arresting officer. It would appear that the time card at least indirectly "tended to incriminate" the defendant. See WIGMORE, *op. cit. supra* note 4, § 2260; Wartels and Pollitt, *supra* note 10, at 21, 22.

14. It has sometimes been said that driving on a highway is a privilege which the state may grant or take away as it pleases, which includes the right to impose whatever conditions it chooses therewith. The driver is held to have accepted these conditions in applying for a license. People v. Rosenheimer, 209 N. Y. 115 (1913); State v. Sterrin, 78 N. H. 220, 98 Atl. 482 (1916). *Cf.* Hess v. Pawloski, 274 U. S. 352 (1927), 41 HARV. L. REV. 94, 76 U. OF PA. L. REV. 93. *Contra:* Rembrandt v. City of Cleveland, 28 Ohio App. 4, 161 N. E. 364 (1927), (1928) 28 COL. L. REV. 971, 13 MINN. L. REV. 150.

To say that the driver waives all his constitutional privileges by accepting a license seems rather unfounded. The better rule might be that he accepts all *reasonable* conditions imposed upon his driving. Notice that the privilege here involved may in some cases be waived by the party testifying. People v. Nachowicz, 340 Ill. 480, 172 N. E. 812 (1930).

In line with the argument of reasonable conditions, the instant statute would not seem too harsh on the defendant. But in view of the doubtful value of the evidence

However, the fact that its enforcement requires a violation of a firmly established constitutional right of the individual would indicate that its purpose might be better achieved by a police measure other than the instant statute.

Insurance—Duty of Insured to Submit to Treatment or Minor Operation under Total and Permanent Disability Policy—Plaintiff sued to recover under insurance policies issued by defendant for total and permanent disability benefits.[1] Defendant's answer alleged that plaintiff was not totally and permanently disabled within the meaning of the policies, since, during the period for which he claims benefits, he was suffering from diabetes, which he voluntarily allowed to exist; that he failed to avail himself of treatment advised by his physician; and that said treatment (insulin and dieting) is non-dangerous. There was no provision in the policy regarding such treatment. *Held* (three justices dissenting), plaintiff's demurrer to defendant's answer sustained. Plaintiff is under no duty to take treatments, defendant being obligated to pay irrespective of curability. *Miller v. Mutual Life Ins. Co. of New York,* 289 N. W. 399 (Minn. 1939).

Accord: John Hancock Mut. Life Ins. Co. v. Spurgeon, 134 S. W. (2d) 155 (Tenn. 1939) (plaintiff, disabled by hemorrhoids, refused to submit to the cure of a minor operation).

There is an irreconcilable conflict of authority over the recently raised question of an insured's duty to submit to medical treatment after sustaining injury, as a prerequisite to recovery upon a total and permanent disability policy. A numerical minority of the cases hold that disability is not total and permanent where the insured can be cured by treatment short of a major operation.[2] He is thus held to the standard of a "reasonably prudent man" who, it is argued, would obtain treatment where no danger is involved thereby.[3] This result is reached by analogy to tort, breach of contract and

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in this case, see note 3 *supra,* the words of Cardozo, J., "Historic liberties and privileges are not to bend from day to day 'because of some accident of immediate overwhelming interest which appeals to the feelings and distorts the judgment'," in Doyle v. Hofstader, 257 N. Y. 244, 268, 177 N. E. 489, 498 (1931) (citing Holmes, J., in Northern Securities v. United States, 193 U. S. 197, 400 (1904) seem very appropriate.

1. The provisions of the policies are as follows:
"Section 3. Benefits in Event of Total and Permanent Disability before Age 60.
"Total Disability.—Disability shall be considered total when there is any impairment of mind or body which continuously renders it impossible for the Insured to follow a gainful employment.
"Permanent Disability.—Total disability shall, during its continuance, be presumed to be permanent;
"(a) If such disability is the result of conditions which render it reasonably certain that such disability will continue during the remaining lifetime of the Insured;".

2. Equitable Life Assur. Soc. of the United States v. Singletary, 71 F. (2d) 409 (C. C. A. 4th, 1934); Culver v. Prudential Ins. Co. of America, 36 Del. 582, 179 Atl. 400 (Super. Ct. 1935); Finkelstein v. Metropolitan Life Ins. Co., 152 Misc. 439, 273 N. Y. Supp. 629 (Sup. Ct. 1934); Cody v. John Hancock Mut. Life Ins. Co., 111 W. Va. 518, 163 S. E. 4 (1932), (1933) 20 VA. L. REV. 235; *see* Eggen v. United States, 58 F. (2d) 616, 620 (C. C. A. 8th, 1932) (war risk insurance); *cf.* Aetna Life Ins. Co. v. Sanders, 192 Ark. 590, 93 S. W. (2d) 141 (1936); Liberty Life Assurance Soc. v. Downs, 112 So. 484 (Miss. 1927). The two last named cases indicate the valid distinction between major and minor operations.

3. *See* Aetna Life Ins. Co. v. Sanders, 192 Ark. 590, 592, 93 S. W. (2d) 141, 142 (1936); Culver v. Prudential Ins. Co. of America, 36 Del. 582, 590, 179 Atl. 400, 403 (Super. Ct. 1935); 1 SEDGWICK, DAMAGES (9th ed. 1912) § 214a.

workmen's compensation cases [4] wherein the doctrine of "avoidable consequences" has full application,[5] i. e., a plaintiff can have no recovery for those damages which he could reasonably have avoided after his cause of action has once accrued.[6]

The majority cases, of which the instant decisions are illustrative, refuse to impose a legal duty to seek treatment in the absence of a specific policy stipulation.[7] The analogies of the minority are condemned as fallacious: tort cases differ in that there, defendant's tortious action is not the proximate cause of the subsequent damage, plaintiff's unreasonable conduct having supervened, whereas here, causation is not in issue; [8] breach of contract cases are distinguished on the ground that in the instant insurance cases, plaintiff is not requesting damages in excess of the actionable breach, but is demanding only the agreed performance; [9] and the workmen's compensation cases are dissimilar since there, statutes generally impose a duty on employers to furnish medical aid to injured employees, so that if they refuse same, they have no right to consequential damages.[10] The question resolves then into one of contractual construction. On this point it has been strongly urged that the situation is analogous to instances of intentional self-injury,[11] in which cases the insurer is relieved of liability.[12] However, the majority insists that it is not within the contemplation of the parties that medical treatment be a condition precedent to the contract; that defendant is not insuring against only incurable diseases.[13] While the minority view of "total and permanent disability" seems more consonant with the layman's conception of that phrase, the majority typically illus-

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4. See, e. g., Cody v. John Hancock Mut. Life Ins. Co., 111 W. Va. 518, 163 S. E. 4 (1932), the leading case on the minority view. The *per curiam* opinion in Finkelstein v. Metropolitan Life Ins. Co., 152 Misc. 439, 273 N. Y. Supp. 629 (Sup. Ct. 1934) was based solely upon a workmen's compensation case.

5. Tort: Leitzell v. Delaware, L. & W. R. R., 232 Pa. 475, 81 Atl. 543 (1911); see 1 SEDGWICK, *op. cit. supra* note 3, §§ 201, 204; RESTATEMENT, TORTS (1939) § 918. Contract: Emery v. Steckel, 126 Pa. 171, 17 Atl. 601 (1889); see 1 SEDGWICK, *op. cit. supra* note 3 § 204; RESTATEMENT, CONTRACTS (1932) § 336. Workmen's Compensation: Snooks's Case, 264 Mass. 92, 161 N. E. 892 (1928); see 2 SCHNEIDER, WORKMEN'S COMPENSATION LAW (2d ed. 1932) § 428.

6. MCCORMICK, LAW OF DAMAGES (1935) § 33.

7. Volunteer State Life Ins. Co. v. Weaver, 232 Ala. 224, 167 So. 268 (1936); Pacific Mut. Life Ins. Co. v. Matz, 102 Colo. 587, 81 P. (2d) 775 (1938), 23 MINN. L. REV. 384 (1939); Tittsworth v. Ohio Nat. Life Ins. Co., 6 Tenn. App. 206 (1927); *see* Maresh v. Peoria Life Ins. Co., 133 Kan. 191, 197, 299 Pac. 934, 937 (1931); Ford v. New York Life Ins. Co., 176 S. C. 186, 194, 180 S. E. 37, 41 (1935); Shane v. Equitable Life Assur. Soc. of the United States, 22 Tenn. App. 85, 89, 118 S. W. (2d) 570, 573 (1938).

8. *See* instant *Miller* case, at 401; Tittsworth v. Ohio Nat. Life Ins. Co., 6 Tenn. App. 206, 209 (1927).

9. *See* instant *Miller* case, at 401.

10. *See* Tittsworth v. Ohio Nat. Life Ins. Co., 6 Tenn. App. 206, 208 (1927); 2 SCHNEIDER, *op. cit. supra* note 5, §§ 488, 489.

11. Walker, *Duty to Submit to Surgical Treatment Under Total Disability Insurance Policy* (1935) 21 VA. L. REV. 895, 911 *et seq.* Mr. Walker's argument is that there is no fundamental distinction between an affirmative act of self-injury and a negative act of self-injury through "wilfully refusing to submit to reasonable medical treatment. In either event, the disability is caused by the wilful conduct of the insured, and he should not be allowed to recover benefits for this disability." *But see* instant *Miller* case, at 402.

12. RICHARDS, INSURANCE (4th ed. 1932) § 407.

13. *See* Prudential Ins. Co. of America v. Brasier, 260 Ky. 240, 241, 84 S. W. (2d) 43, 44 (1933); Roderick v. Metropolitan Life Ins. Co., 231 Mo. App. 852, 857, 98 S. W. (2d) 983, 985 (1936).

trates the strict attitude of the courts toward insurance companies.[14] On the other hand, the latter view is perhaps the more just, since, by its greater resources, the insurer is better able to spread the financial burden, and a "good faith" requirement would serve to prevent carrying the rule to unjust ends.[15] Such speculation is of little consequence, however, as the obvious remedy of the insurer is to include an appropriate provision in its policy, thereby removing the cause of the controversy.[16]

Procedure—Joinder of Third-Party Defendant Where Plaintiff Objects, under Rule 14 of New Federal Rules—Defendants' motions to join as third-party defendants [1] parties they alleged to be solely liable to the plaintiff were resisted by the plaintiff, but were granted *ex parte* in so far as the third-party defendants were concerned.[2] On a subsequent motion by the third-party defendants to dismiss the third-party complaints, it was *held* that the order directing the inclusion of the additional defendants should be vacated in the light of indication that the plaintiff would under no circumstances seek to recover from the third-party defendants.[3] *Satink v. Holland Twp.*, U. S. Dist. Ct., N. J., Feb. 7, 1940.

The court apparently assumes without comment that impleader of third parties under Rule 14 of the new Federal Rules of Procedure lies within the discretion of the court. The language of the Rule [4] seems to support this interpretation. Impleader practice in other jurisdictions has always been discretionary,[5] and a recent district court decision has directly so held.[6] Assuming that impleader will be considered discretionary rather than a matter of right, the further problem of determining how to exercise the discretion arises. Where, as in the instant case, the third-party complaint alleges that the party sought to be joined is solely liable to the plaintiff, the convenience to the court of having all parties before it and to the adminis-

14. *See* dissenting opinion in instant *Miller* case *passim*; Volunteer State Life Ins. Co. v. Weaver, 232 Ala. 224, 225, 167 So. 268, 269 (1936); Jefferson Standard Life Ins. Co. v. Hurt, 254 Ky. 603, 608, 72 S. W. (2d) 20, 22 (1934).

15. *See* Prudential Ins. Co. of America v. Brasier, 260 Ky. 240, 241, 84 S. W. (2d) 43, 44 (1935).

16. *See* Volunteer State Life Ins. Co. v. Weaver, 232 Ala. 224, 225, 167 So. 268, 269 (1936); Roderick v. Metropolitan Life Ins. Co., 231 Mo. App. 852, 857, 98 S. W. (2d) 983, 985 (1936).

1. Under Rule 14 (a), FED. RULES CIV. PROC., which permits joinder of additional defendants where they are liable to the defendant or to the plaintiff for all or part of the plaintiff's claim.

2. Satink v. Holland Twp., 28 F. Supp. 67 (D. N. J. 1939).

3. The original motion was resisted by the plaintiff. *Id.* at 71. Moreover, the plaintiff "declines to amend her complaint and assert a claim for relief against third-party defendants." Instant case.

4. ". . . a defendant may move . . . *for leave* as a third-party plaintiff to serve a summons and complaint upon a person not a party to the action. . . . *If* the motion is granted . . ." (italics supplied), FED. RULES CIV. PROC., Rule 14 (a).

5. Joinder is expressly made permissive within the court's discretion under the New Pennsylvania Rules of Civil Procedure, Rule 2252 (e), 332 Pa. cxxvi (1939); Note (1939) 88 U. OF PA. L. REV. 194. The New York Statute, N. Y. CIV. PRAC. ACT, § 193 (2), permitting joinder has been held to be discretionary. Greenhouse v. Rochester Taxicab Co., 218 App. Div. 224, 218 N. Y. Supp. 167 (4th Dep't 1926); LaLone v. Carlin, 139 Misc. 553, 247 N. Y. Supp. 665 (1931). Impleader is discretionary under the English practice. Gowar v. Hales [1928] 1 K. B. 191; Baxter v. France [1895] 1 Q. B. 591. See also Van Cott v. Marion De Vries, Inc., 37 F. (2d) 48 (C. C. A. 2d, 1930); 1 MOORE, FEDERAL PRACTICE (1938) 741, § 14.02.

6. General Taxicab Ass'n v. O'Shea, U. S. Ct. of App., D. C., Jan. 15, 1940.

tration of justice in settling the whole controversy at once is balanced by the inconvenience, expense, and prejudice to the plaintiff.[7] Additional considerations, if present, should therefore serve to tip the balance one way or the other. Thus, the fact that plaintiff resists the joinder and declines to assert a claim against the additional defendant should serve as a valid reason for denying the motion to join [8] since the whole controversy, unless plaintiff has a change of heart, will be settled without joinder. It should, however, be remembered that mere failure on the part of the plaintiff to amend his complaint and thereby assert a claim against the additional defendant will not usually indicate a resistance to the joinder on the plaintiff's part inasmuch as the plaintiff will ordinarily defer amending his complaint until after a ruling on the motion.[9] Moreover, Rule 14 may well be interpreted to permit recovery against a third party whether the plaintiff has amended his complaint to include that party or not.[10] However, where plaintiff's objection to the joinder is certain, the decision of the instant court to deny the motion apparently esatblishes a sound rule for the exercise of proper discretion.

Taxation—Sales Tax on Goods Contracted to be Shipped in Interstate Commerce—Respondent, a Pennsylvania mining corporation, maintained a sales office in New York City where it contracted with New York customers for the sale of coal brought from the mine to the dock in Jersey City, and then delivered by barge to the point of delivery. Respondent contended that the New York City sales tax [1] on purchasers of personal property did not apply to its contracts, since they contemplated the shipment of the coal from outside the state. *Held,* (three Justices dissenting) that imposition of the tax was not an infringement of the Commerce Clause [2]

7. Commentary, *Discretion of Court on Motion to Bring in Third-Party Defendant* (1939) 2 FED. RULES SERV. 14a.15. The plaintiff should not be subjected to unreasonable cost and delay through the introduction of new parties. Broderick v. White, 148 Misc. 632, 266 N. Y. Supp. 223 (1933); State v. Zimmerman, 194 Wis. 193, 215 N. W. 887 (1927); Wye Valley Ry. Co. v. Hawes, 16 Ch. D. 489 (1880). Parties may be added on defendant's motion only "if it can be done without prejudice to the rights of any party." Greenhouse v. Rochester Taxicab Co., 218 App. Div. 224, 218 N. Y. Supp. 167, 170 (4th Dep't 1926).

8. General Taxicab Ass'n v. O'Shea, U. S. Ct. of App., D. C., Jan. 15, 1940. *See* Crim v. Lumbermans Mutual Casualty Co., 26 F. Supp. 715, 720 (D. D. C. 1939); Commentary, *loc. cit. supra* note 7.

9. The motion may be made *ex parte* even before defendant files his answer. FED. RULES CIV. PROC., Rule 14 (a). Under the more explanatory Pennsylvania Rules, plaintiff need not amend until after the additional defendant has filed an answer to the third-party complaint. Rule 2258 (a), 332 Pa. cxxx (1939). Ruling on the motion to dismiss will ordinarily precede the filing of defendant's answer. See Rule 2256 (c), *id.* at cxxix.

10. Commentary, *Necessity of Amendment of Complaint to Assert Claim Against Third-Party Defendant* (1939) 1 FED. RULES SERV. 14a.512. Plaintiff was expressly relieved from the necessity of amending under the Pa. Sci. Fa. Act, PA. STAT. ANN. (Purdon, Supp. 1938) tit. 12, § 141; Scott, *Some Aspects of the Pennsylvania Sci. Fa. Act* (1931) 79 U. OF PA. L. REV. 306. Moore takes the view that the Federal Rule was certainly not meant to go that far. 1 MOORE, FEDERAL PRACTICE (1938) 743, § 14.02. The present Pennsylvania Rules, changing the rule of the Sci. Fa. Act, adopts the latter view expressly. Rule 2258 (c), 332 Pa. cxxx (1939). Language of the Federal Rule is ambiguous: "The plaintiff *may* amend his pleadings to assert against the third-party defendant any claim which the plaintiff might have asserted against the third-party defendant had he been joined originally as a defendant." FED. RULES CIV. PROC., Rule 14 (a).

1. City of New York Local Law No. 24 published as No. 25, of 1934.
2. U. S. CONST. Art. I § 8.

and it was therefore validly levied,[3] being no different in substance from the use taxes previously sustained.[4] *McGoldrick v. Berwind-White Coal Mining Co.*, 60 Sup. Ct. 388 (1940).

With the holding in the instant case, the Commerce Clause again suffers a readjustment,[5] but this time its effect is limited in order to permit state taxation of what has heretofore been held to be protected commerce. Notwithstanding the attempt of the majority of the Court to reconcile the result with the cases supporting the dogma laid down in *Robbins v. Shelby County Taxing District* [6] that "interstate commerce cannot be taxed at all" there is little doubt that the taxing area available to the states has been enlarged. This in itself is no longer surprising, but apparently is merely another step in the new approach to state taxation of goods in interstate commerce as reflected in the recent cases.[7] As indicated by the court, strong support for this opinion may be found in the so-called use tax cases,[8] where a tax is applied for the "use" of property originally bought outside the state, and is intended to serve as a complement to a sales tax imposed on goods purchased in the state. Disregarding the terminology of the use tax case, it is not difficult to apprehend that the ultimate effect of such a tax is scarcely different from that of the levy here.[9] Thus, there is a growing emphasis on the duty of interstate commerce to pay its own way.[10] If reliance is put on the older cases, the position of the minority seems to be the stronger in maintaining that the imposition of a tax on local business cannot in itself warrant a like burden on interstate commerce as a protection for local activity.[11] Such a view imports that interstate commerce requires a more favored position in order that it be preserved intact. No doubt the check on the states offered by the Commerce Clause is still necessary, but

3. The decision reverses the holding of the Appellate Division of the New York Supreme Court that the statute was invalid. 255 App. Div. 961, 8 N. Y. Supp. (2d) 668 (1st Dep't 1938), *aff'd without opinion*, 281 N. Y. 94, 22 N. E. (2d) 173 (1939).

4. Southern Pacific Co. v. Gallagher, 306 U. S. 167 (1939); Henneford v. Silas Mason Co., 300 U. S. 577 (1937); Monamotor Oil Co. v. Johnson, 292 U. S. 86 (1934).

5. The Supreme Court has recently been expanding and contracting the Commerce Clause to get the desired result in a given case. Thus, while narrowing its application in the tax field, it has extended the commerce power beyond all precedent in order to sustain the National Labor Relations Act. See Consolidated Edison Co. v. N. L. R. B., 305 U. S. 197 (1938); N. L. R. B. v. Jones & Laughlin Steel Corp., 301 U. S. 1 (1937). See also Donoho, *Jurisdiction of the National Labor Relations Board—The Developing Concept of Interstate Commerce* (1938) 6 GEO. WASH. L. REV. 436; Note (1938) 48 YALE L. J. 273. But compare McCarroll v. Dixie Greyhound Lines, 60 Sup. Ct. 504 (1940).

6. 120 U. S. 489 (1887). See also Real Silk Hosiery Mills v. Portland, 268 U. S. 325 (1925); Western Oil Refining Co. v. Lipscomb, 244 U. S. 346 (1917); Davis v. Virginia, 236 U. S. 697 (1915).

7. Henneford v. Silas Mason Co., 300 U. S. 577 (1937); Wiloil Corp. v. Pennsylvania, 294 U. S. 169 (1935). See also Lockhart, *The Sales Tax in Interstate Commerce* (1939) 52 HARV. L. REV. 617; Notes (1939) 87 U. OF PA. L. REV. 712, 52 HARV. L. REV. 502. But see Gwin, White & Prince v. Henneford, 305 U. S. 434 (1939); Adams Mfg. Co. v. Storen, 304 U. S. 307 (1938).

8. See cases cited *supra* note 4.

9. See Lowndes, *The Supreme Court on Taxation, 1936 Term* (1937) 86 U. OF PA. L. REV. 1, 19.

10. See Western Live Stock v. Bureau of Revenue, 303 U. S. 250, 254 (1938); instant case, at 392.

11. "Interstate commerce cannot be taxed at all, even though the same amount of tax should be laid on domestic commerce, or that which is carried on solely within the state." Robbins v. Shelby County Taxing District, 120 U. S. 489, 497. See Johnson, *State Sales Taxes and the Commerce Clause* (1936) 24 CALIF. L. REV. 155, 159; Powell, *Indirect Encroachment on Federal Authority by the Taxing Powers of the States* (1918) 31 HARV. L. REV. 572, 574.

the desideratum which occasioned it [12] having long since been realized, it would seem that the newer perspective of the Court more nearly conforms to present economy. It is also notable that at least two dangers are avoided by sustaining taxes like this one. First, local business is not diverted into channels which lead to the strengthening of nation-wide business monopolies;[13] and secondly, the problem of revenue, lately grown so acute, is eased somewhat for taxing units which have already tapped all other conceivable sources of funds.[14] Though at least this is gained, a threat to interstate commerce still remains, *viz.*, the possibility that this single transaction will also be taxed by other states in any way connected with its consummation.[15] This potentiality has markedly influenced the Court's tax opinions in recent years,[16] and it was Mr. Justice Stone himself, the writer of the present opinion, who first advanced this concept. Significantly, the majority opinion fails to discuss the contingency of the multiple burden. But it does not appear that invalidating the tax would have achieved a practical and sound result. The best answer seems to be to allow the tax and adopt the view of Mr. Justice Black, dissenting in *Gwin, White & Prince v. Henneford* wherein he denies that the commerce power is a self-executing limitation on the right of the states to tax [17] and urges that is for Congress alone to regulate the flow of commerce among the states.[18]

Torts—Interference with Economic Expectancy by Inducing a Refusal to Contract—Plaintiff had an annual broadcasting contract with a radio station, which had been renewed each year for the past 10 years. Defendants, by means of letters, telephone calls, and messages, charged that plaintiff "attacks the Catholic Church, misrepresents her teachings and foments religious hatred and bigotry", and threatened to discontinue their business relations with the department store managing this radio station, unless plaintiff was prevented from broadcasting. Plaintiff claims that defendants' action caused the refusal to renew the annual contract and destroyed plaintiff's economic expectancy under it. *Held,* protests and threats to withdraw patronage which induce a refusal to contract do not constitute a cause of action "where the objects to be obtained are legitimate". *Watch Tower Bible & Tract Society v. Dougherty et al.,* 11 A. (2d) 147 (Pa. Sup. Ct. 1940).

"Inducing a refusal to deal", considered an invasion of one's right to probable and reasonable economic expectancies, is still in its formative stage as a part of tort law. It is a development from what is also a recent prin-

12. See Perkins, *The Sales Tax and Transactions in Interstate Commerce* (1933) 12 N. C. L. REV. 99, 104 *et seq.*

13. See Lowndes, *State Taxation of Interstate Sales* (1935) 7 MISS. L. J. 223.

14. See Perkins, *supra* note 12, at 99; Note (1938) 48 YALE L. J. 273.

15. This is one of the main objections raised against the soundness of the tax in the dissenting opinion by Chief Justice Hughes.

16. See Gwin, White & Prince v. Henneford, 305 U. S. 434 (1939); Western Live Stock v. Bureau of Revenue, 303 U. S. 250 (1938); Adams Mfg. Co. v. Storen, 304 U. S. 311 (1938).

17. Gwin, White & Prince v. Henneford, 305 U. S. 434, 445 (1939).

18. *Id.* at 455: "I would return to the rule that—except for state acts designed to impose discriminatory burdens on interstate commerce because it is interests—Congress alone must determine . . . how far it shall be burdened by duties and imposts, and how far it shall be prohibited."

ciple,[1] even though now fairly well settled,[2] that one who induces a third person not to perform his contract with another is liable to the latter.[3] Of course without an existing contract the plaintiff's interest is less tangible.[4] But that the law has often deemed it proper to guard indefinite interests is evidenced by the securing of trade secrets,[5] property disparagement,[6] business reputation.[7] A closer analogy, also afforded protection, is the expectancy of livelihood from catching fish and wild game,[8] and this, together with the instant interest, the right to contract free from malicious [9] interference, is certainly more tangible, for the wrong committed injures the business directly. Recognizing that the individual is entitled to the advantages resulting from his own enterprise, industry, skill and credit,[10] some courts allow this cause of action where the defendant has engaged in acts of violence, fraud or misrepresentation;[11] others permit its existence even

1. Lumley v. Gye, 2 E. B. 216, 118 Eng. Rep. R. 749 (1853) forms the landmark in this field, for it extended liability although the defendant's conduct was unmarked by violence, fraud, and even though the master-servant relation no longer existed. Discussions tracing the historical development may be found in HARPER, TORTS (1933) §§ 227-234; RESTATEMENT, TORTS (1939) § 766; Note (1935) 33 MICH. L. REV. 943.

2. HARPER, TORTS, at § 228, n. 13. See Carpenter, *Interference with Contract Relations* (1928) 41 HARV. L. REV. 728; Sayre, *Inducing Breach of Contract* (1923) 36 HARV. L. REV. 663.

3. Temperton v. Russel, 1 Q. B. D. 715 (1893); Hornstein v. Podwitz, 254 N. Y. 443, 173 N. E. 674 (1930) (analyzing previous New York decisions); Caskie v. Phila. Rapid Transit Co., 334 Pa. 33, 5 A. (2d) 368 (1939), *aff'g*, 321 Pa. 157, 184 Atl. 17 (1936); Klauder v. Cregar, 327 Pa. 1, 192 Atl. 667 (1937) (citing abundant authority), 12 TEMP. L. Q. 131; *see* Dorrington *et al.* v. Manning *et al.*, 135 Pa. Super. 194, 201, 4 A. (2d) 886, 890 (1939); E. L. Husting Co. v. Coca Cola Co. *et al.*, 205 Wis. 356, 365-367, 237 N. W. 85, 88-89 (1931). *But cf.* Swain v. Johnson, 151 N. C. 93, 65 S. E. 619 (1909) where this right is recognized only as it existed before *Lumley v. Gye*.

4. Note (1936) 24 CALIF. L. REV. 208, 213.

5. See HARPER, TORTS, at 495.

6. *Id.* at § 276.

7. *See* Walker v. Cronin, 107 Mass. 555, 562-563 (1871).

8. Keeble v. Hickeringill, 11 East 574, 103 Eng. Rep. R. 1127 (K. B. 1809); *cf.* Lewis v. Corbin, 195 Mass. 520, 81 N. E. 248 (1907) (expectancy under a will). See RESTATEMENT, TORTS, EXPLANATORY NOTES (Proposed Final Draft No. 6, 1939) 190.

9. The courts are frank to admit that by the use of the word malice, in protecting contract rights, they mean an intentional interference without justification with knowledge of the existence of the contractual rights. Hornstein & Podwitz, 254 N. Y. 443, 173 N. E. 674 (1930); Klauder v. Cregar, 327 Pa. 1, 192 Atl. 667 (1937); HARPER, TORTS § 229; RESTATEMENT, *op. cit. supra* note 8, at 186.

10. *See* Walker v. Cronin, 107 Mass. 555, 564 (1871).

Jersey City Printing Co. v. Cassidy, 63 N. J. Eq. 759, 765, 53 Atl. 230, 233 (Ch. 1902): "A large part of what is most valuable in modern life, seems to depend more or less directly upon 'probable expectancies'. When they fail, civilization, as presently organized, may go down. As social and industrial life develops and grows more complex these 'probable expectancies' are bound to increase. It would seem to be inevitable that courts of law, as our system of jurisprudence is evolved to meet the growing wants of an increasingly complex social order, will discover, define and protect from undue interference more of these 'probable expectancies'." See Sayre, *supra* note 2, at 675-76.

11. Perkins v. Pendleton, 90 Me. 166, 177, 38 Atl. 96, 99 (1897). "Merely to induce another to leave an employment or to discharge an employee, by persuasion or argument, however whimsical, unreasonable or absurd, is not in and of itself unlawful, and we do not decide that such interference may become unlawful by reason of the defendant's malicious motives, but simply that to intimidate an employer, by threats, if the threats are of such a character as to produce this result, and thereby cause him to discharge an employee, whom he desired to retain and would have retained, except for such unlawful threats, is an actionable wrong."

Raycroft v. Tayntor, 68 Vt. 219, 35 Atl. 53 (1896) refuses to protect this interest at all, and is supported by Sayre, *supra* note 2, at 700.

though the defendant uses persuasion alone.[12] Certainly, since the wrong exists no matter what the means of accomplishment,[13] the latter seems the better view. Of course, no interest is so sacred that it may not be outweighed by combinations of utilities,[14] and, as in almost all of tort law, privileges condone certain invasions. As yet these privileges have not attained a categorical standard. The nature of the expectancy invaded must be balanced against the means used by the defendant plus the interest he seeks to advance.[15] Also meriting consideration is the possibility that freedom of speech and of action which the common law attempts at all times to guard,[16] may be curbed by too strong an enforcement of this tort interest. From the decision in the instant case, it cannot be determined whether a cause of action was not recognized, or was admitted subject to privilege. The decision would be the same under either approach, for the plaintiff stated no damages to give rise to a cause of action, and in addition the interest which the defendants were protecting together with the fact that they used the only feasible means available appears to condone their action. However, since this is the first Pennsylvania case that squarely raises this issue,[17] it is unfortunate that a more detailed opinion was not rendered. There is no authority contra, and in view of inferences from lower court opinions favoring the recognition of this right,[18] it is likely that the inducing of a refusal to contract may become part of Pennsylvania tort law.

Torts—Retention of Unauthorized Photograph as Invasion of the Right of Privacy—While plaintiff was in a semi-conscious condition in the hospital, the defendant, her doctor, photographed the facial disfigurement which resulted from plaintiff's illness, without her consent or that of her husband, who is joined as co-plaintiff. Plaintiffs filed a bill in equity to enjoin the defendant from developing and using the prints of the films and to direct him to hand them over to the plaintiffs, alleging that their posses-

12. Quinn v. Leathem, [1901] A. C. 495; American Well Works Co. v. Layne & Bowler Co., 241 U. S. 257 (1916); United States Fidelity & Guaranty Co. v. Millonas, 206 Ala. 147, 89 So. 732 (1931); Chipley v. Atkinson, 23 Fla. 206, 1 So. 934 (1887); Lucke v. Clothing Cutters' and Trimmers' Assembly, 77 Md. 396, 26 Atl. 505 (1893); Jersey City Printing Co. v. Cassidy, 63 N. J. Eq. 759, 53 Atl. 230 (Ch. 1902); Delz v. Winfree, 80 Tex. 400, 106 S. W. 111 (1891); *see* May v. Wood, 172 Mass. 11, 14, 51 N. E. 191, 192 (1898).

13. American Well Works Co. v. Layne and Bowler Co., 241 U. S. 257, 260 (1916).

14. Minasian v. Osborne, 210 Mass. 250, 96 N. E. 1036 (1911). See HARPER, TORTS § 231; RESTATEMENT, TORTS, at § 767; Note (1932) 17 CORN. L. Q. 509.

15. See *supra* note 14.

16. See Sayre, *supra* note 2, at 687.

17. The court cites two cases as authority for this point: Kirmse v. Adler, 311 Pa. 78, 166 Atl. 506 (1933), and Cote v. Murphy, 159 Pa. 420, 28 Atl. 145 (1894). These cases involve labor disputes, and were decided mainly on labor arguments. On this ground they appear clearly distinguishable, for, although there are many instances where the same considerations apply to individuals as well as to organized employee and employer groups, the usual interplay of human values and social and economic doctrines where labor is concerned are prone to produce a different balance of utilities under the same facts. Therefore, while definitely regarding these cases as a part of this broad right, their treatment in a separate sub-division seems proper.

18. Lauer v. Lauer, 21 North. 132 (Co. C. P. 1927). The court treats this as a breach of contract and holds liability. But on the facts, since only an "at will" contract existed, it was an interference with the right to contract freely. *See* Angiolillo v. Amalgamated Clothing Workers of America, 23 D. & C. 511, 516 (Phila. C. P. 1, 1934), where a claim for damages based upon defendant's action in preventing plaintiff from securing employment was dismissed for lack of evidence. The court intimates that had plaintiff sustained the burden of proof, these facts would be actionable.

sion by the physician caused them mental anguish and humiliation. Upon preliminary objections to the bill, it was *held,* that the statement alleged an invasion of the plaintiff's right of privacy for which equitable relief can be granted. *Clayman v. Bernstein,* Phila. Legal Intelligencer, Feb. 7, 1940, p. 1, col. 1 (Phila. C. P. 5, 1940).

The right of privacy,[1] in the majority of jurisdictions [2] is held to have been violated by the photographer who unreasonably invades the private affairs of another who suffers thereby.[3] While the independent existence of the right has been recognized,[4] its protection has been restricted by the freedom of speech and press [5] and by the ordinary interest of society in the affairs of the individual.[6] Further limitation has resulted from the refusal of some courts to grant equitable relief when there are no property rights involved.[7] Arising in a state where the right of privacy has barely been recognized by the appellate courts [8] the instant opinion is noteworthy, not only because it affirms recognition of the right involved as an independent

1. The existence of this right as an independent one is generally conceded to have been recognized originally by Professor Warren and Justice Brandeis in their article, *The Right to Privacy* (1890) 4 HARV. L. REV. 193, where in previous cases involving an invasion of the private affairs or life of another that had been decided on "property", "contract" or "breach of trust" doctrines, were reviewed. Even before this article, however, at least one other writer recognized that *some* right of action would arise from an unauthorized use of a photograph. See J. A. J., *The Legal Relations of Photographs* (1869) 8 AM. L. REG. (N. S.) 1, 8.

2. Bazemore v. Savannah Hospital, 171 Ga. 257, 155 S. E. 194 (1930); Kunz v. Allen, 102 Kan. 883, 172 Pac. 532 (1918). *Contra:* Atkinson v. Doherty, 121 Mich. 372, 80 N. W. 285 (1899). See Comment (1939) 13 So. CALIF. L. REV. 81, 83, also RESTATEMENT, TORTS, EXPLANATORY NOTES (Proposed Final Draft No. 9, 1939) § 33 and cases cited therein. Apparently distribution or publication is not essential to an action for the invasion of the right. Though this point has not been expressly passed upon by the courts, and while in most of the cases there has been publication [see for example Bazemore v. Savannah Hospital, 171 Ga. 257, 155 S. E. 194 (1930); Flake v. Greensboro News Co., 212 N. C. 780, 195 S. E. 55 (1938)], nevertheless there was no publication in the leading American case, Manola v. Stevens & Myers (N. Y. Sup. Ct. 1890). *Cf.* Green, *The Right of Privacy* (1932) 27 ILL. L. REV. 237, 245.

Alessandroni, J., in the instant case states: "The author of a libel is the creator and there can be no offence until the contents are communicated to another. . . . One's right of privacy, however, may be invaded by a single human agency." And adds: ". . . the mere development would constitute publication even if the established laws of libel are adopted." *Ibid.*

3. "A person who unreasonably and seriously interferes with another's interest in not having his affairs known to others or his likeness exhibited to the public is liable to such other." RESTATEMENT, TORTS (Proposed Final Draft No. 9, 1939) § 33.

4. "It would appear that the right 'to be let alone' . . . is an inherent natural right, and that what we have in these photograph cases is . . . not an attempt to establish a new right . . . but rather a new method of invading an old right." Fitzpatrick, *The Unauthorized Publication of Photographs* (1932) 20 GEO. L. J. 134, 158. See also Green, note 2 *supra,* at 238; Note (1934) 9 ST. JOHN'S L. REV. 159, 160.

5. See Pavesich v. New Eng. Life Ins. Co., 122 Ga. 190, 202, 50 S. E. 68, 73 (1905). See also Green, note 2 *supra,* at 246; Pound, *Interests of Personality* (1915) 28 HARV. L. REV. 343, 363.

6. Green, note 2 *supra,* at 246.

7. This doctrine as to equity jurisdiction is also a comparatively recent one in the chancery courts, dating from Lord Eldon's dictum in Gee v. Pritchard, 2 Swans. 402, 413, 36 Eng. Rep. R. 670, 674 (1818). Reluctance on the part of equity courts to abandon this doctrine probably explains why the right of privacy was first protected as a property right. Note 1 *supra.* See Long, *Equitable Jurisdiction to Protect Personal Rights* (1923) 33 YALE L. J. 115, 117. "It is believed that all that the courts require is *a well-defined interest of value of any sort* which is threatened by *some form of appropriation* against which there is *no adequate remedy at law* and as to which the protection sought will be effective." Green, note 2 *supra,* at 259.

8. The concurring opinion of Maxey, J., in Waring v. WDAS Broadcasting Station, Inc., 327 Pa. 433, 456, 194 Atl. 631, 642 (1937) was the first discussion of the right of privacy in Pennsylvania.

one, but because it grants injunctive relief in the face of precedent to the effect that equity takes jurisdiction only when there are property rights involved.[9] Unquestionably, the act of the defendant would be considered an actionable invasion in a jurisdiction already recognizing such a cause of action.[10] No social policy would justify an opposite result unless it be said that a physician should be permitted to make and "publish" such a record of his cases.[11] But the consent of the patient would seem to be a small burden to be imposed for the exercise of this privilege. Granting that a legal interest has been invaded, the resulting mental anguish and humiliation appear difficult to measure in an action for damages.[12] And even if damages are calculated for the original invasion in taking and printing the photograph, subsequent publication and republication would not be prevented, so that, as the instant case has held, an injunction would be the only adequate remedy.[13]

Trusts—Spendthrift Trust Held Not Subject to Claim for Support and Maintenance by Divorced Wife and Children of the Beneficiary—Plaintiffs, the divorced wife and children of the beneficiary of a spendthrift trust,[1] seek support and maintenance,[2] from the income or principal of said trust. The settlor (mother of the beneficiary) clearly expressed the intent, in the provisions of the trust set forth in the will, that

9. The principle has been stated in the supplemental opinion in Annenberg v. Roberts, 333 Pa. 203, 217, 2 A. (2d) 612, 619 (1938); Hutchinson v. Goshorn, 256 Pa. 69, 71, 100 Atl. 586 (1917); Ashinsky v. Levenson, 256 Pa. 14, 19, 100 Atl. 491, 493 (1917); Owen v. Henman, 1 W. & S. 548 (Pa. 1841). See Note (1939) 44 DICK. L. REV. 39, where the author states that these cases would oppose equitable relief for an invasion of the right of privacy in Pennsylvania courts. *Id.* at 44. See also Note (1938) 12 TEMP. L. Q. 502, 507, for the same conclusion.

Of course this objection would be answered by employing Dean Green's theory of judicial meaning of "property" rights. Note 7 *supra.*

In the instant case the husband and wife were joined as co-plaintiffs. Throughout the opinion the court treats the defendant 's act as an invasion of the right of privacy of *both* husband and wife. Previously it had been held that the right was so personal that it did not survive the life of the injured party. Schuyler v. Curtis, 147 N. Y. 434, 42 N. E. 22 (1895). But see Bazemore v. Savannah Hospital, 171 Ga. 257, 155 S. E. 194 (1930), (1931) 79 U. OF PA. L. REV. 511, 31 COL. L. REV. 175.

10. See RESTATEMENT, TORTS (Proposed Final Draft No. 9, 1939) illustration 6, at 121, and cases cited in note 2 *supra.*

11. This privilege might be said to be derived from the physician-patient relationship, and the rights of speech and press. See note 5 *supra.*

12. Pound, *Equitable Relief Against Defamation and Injuries to Personality* (1916) 29 HARV. L. REV. 640, 641.

13. *Ibid.* Bazemore v. Savannah Hospital, 171 Ga. 257, 155 S. E. 194 (1930), (1931) 79 U. OF PA. L. REV. 511, 31 COL. L. REV. 175. Compare Legis. (1933) 81 U. OF PA. L. REV. 324, 332, with Lisle, *The Right of Privacy (A Contra View)* (1931) 19 KY. L. J. 137, 144.

1. The trust was created by the will (dated Dec. 18, 1934) of the beneficiary's mother (whose death occurred on Feb. 10, 1935), and provides, with reference to the trust fund in property valued at approximately $50,000, that: "The income therefrom shall be paid to my son. . . . This provision is made for the personal protection and welfare of said beneficiary and such income shall not be susceptible of assignment, anticipation, hypothecation or seizure by legal process. . . ." Instant case, at 2.

2. The divorce was granted in June 1931, and the decree provided for payments by the beneficiary for the support and maintenance of his wife and three children. At the time this bill of complaint was filed, in Feb. 1938, beneficiary was indebted under this decree in the sum of $10,810. Plaintiffs allege that they are all in indigent circumstances while the beneficiary enjoys a substantial income, and, that he has no other assets or income out of which plaintiffs can satisfy arrearage of alimony, or obtain support and maintenance. Instant case, at 2.

no part of the beneficiary's interest, or of the remainder of her estate, should pass into the hands of the divorced wife.[3] *Held* (one justice dissenting), claim for support and maintenance cannot be satisfied out of the income or principal of a spendthrift trust contrary to the express intent of the settlor. *Schwager v. Schwager,* 8 U. S. L. WEEK 319 (C. C. A. 7th, 1940).

In those cases where the settlor did not expressly exclude the beneficiary's wife and children from the trust provisions, the courts of a number of states have held that the interest of the beneficiary of a spendthrift trust can be reached by his wife or children, to enforce their claims against him for support money or alimony.[4] Paying lip-service to the dogma that a settlor may dispose of his property in any way he wishes,[5] yet swayed by sympathy toward indigent dependents, these courts chiefly allow recovery by saying that the settlor did not intend to exclude the beneficiary's wife and children from the benefits of the trust.[6] And it is significant that this result has been reached even where it seemed clearly apparent that the settlor did not intend to include the beneficiary's wife and children.[7] It would seem that

3. ". . . Whenever and if the trustees shall have notice or shall reasonably apprehend that the interest of such beneficiary has been or is threatened to be diverted from said defined purposes in any manner aforesaid or otherwise, the trustees shall withhold the income and principal which might otherwise be payable to the beneficiary hereof from distribution and shall apply the same in such manner as it shall deem expedient in such beneficiary's interest and/or to the support, maintenance, comfort, welfare and necessities of such beneficiary and the members of his lamily then dependent upon him for support, *not, however, including his first wife or any of his children by her.*" (Italics added.) The settlor also provided for certain specific bequests to the three children (plaintiffs) to take effect at the termination of the spendthrift trust, provided, their mother (the divorced wife) would release the beneficiary from all claim for alimony within ninety days after the death of the settlor. (It is to be remembered that the divorce took place in 1931, and the will was drawn up in 1934.) Instant case, at 3.

4. Keller v. Keller, 284 Ill. App. 198, 1 N. E. (2d) 773 (1936) (divorced wife permitted to reach interest of husband-beneficiary of spendthrift trust for support of children), 50 HARV. L. REV. 143; Eaton v. Eaton, 82 N. H. 216, 132 Atl. 10 (1926) (court denied divorced wife's claim for alimony, but allowed support for children); Wetmore v. Wetmore, 149 N. Y. 520, 44 N. E. 169 (1896) (divorced wife allowed claim for alimony. However, by statute in New York, where there is no valid direction for accumulation, the surplus income of a spendthrift trust, above that which is necessary for the support of the beneficiary, is subject to the claims of creditors. And, a similar statute is found in California); Moorehead's Estate, 289 Pa. 542, 137 Atl. 802 (1927) (deserted wife allowed support money), 76 U. OF PA. L. REV. 220; *cf.* Wright v. Leupp, 70 N. J. Eq. 130, 62 Atl. 464 (1905) (an assignment by the beneficiary of a spendthrift trust of a part of his interest for the purpose of providing for the support of his wife and children was held valid). *Contra:* DeRousse v. Williams, 181 Iowa 379, 164 N. W. 896 (1917) (divorced wife denied recovery); Burrage v. Bucknam, 16 N. E. (2d) 705 (Mass. 1938) (divorced wife and child denied recovery); Erickson v. Erickson, 197 Minn. 71, 266 N. W. 161 (1936) (divorced wife denied recovery), 34 MICH. L. REV. 1269. See also GRISWOLD, SPENDTHRIFT TRUSTS (1936) § 333 *et seq.*; I SCOTT, THE LAW OF TRUSTS (1939) § 157 *et seq.*; Notes (1925) 35 A. L. R. 1035, (1928) 52 A. L. R. 1259, (1936) 104 A. L. R. 779.

5. *See* Nichols, Assignee v. Eaton, 91 U. S. 716, 727 (1875). With respect to this point, Scott makes the statement, ". . . the court begs the whole question where it assumes that the donor has unlimited power to dispose of his property as he pleases." I SCOTT, *op. cit. supra* note 4, § 157.1, at 791.

6. E. g., Keller v. Keller, 284 Ill. App. 198, 1 N. E. (2d) 773 (1936); Moorehead's Estate, 289 Pa. 542, 137 Atl. 802 (1927).

7. Moorehead's Estate, 289 Pa. 542, 137 Atl. 802 (1927). "There seems no grave doubt but that the decision reached in the instant case [Moorehead's Estate] was equitable. Yet the court adopted rather strained methods to reach this result." (1927) 76 U. OF PA. L. REV. 220, 222. One of the grounds upon which *Moorehead's Estate* was decided was, that if the intent of the testatrix was to bar the deserted wife, to do so would be contrary to public policy. Such was the construction placed upon *Moorehead's Estate* by the Pennsylvania Superior Court in the case, Thomas v. Thomas, 112 Pa. Super. 578, 588, 172 Atl. 36, 40 (1934) (cited *Restatement of Trusts* § 157).

this approach is taken merely as the easiest way of allowing recovery, whereas the fundamental reason would seem to be that it is against public policy to permit the beneficiary to have the enjoyment of the income from the trust while he refuses to support his dependents. Thus courts are presuming an intent upon the part of the settlor from the strength of the policy argument involved.[8] In the instant case, by virtue of the express exclusion of the beneficiary's wife and children the fiction of "intent" for allowing recovery breaks down, and by emphasizing the question of intention, and ignoring the question of policy, recovery was denied. But rather than make the settlor's intent the turning point, it would appear to be more satisfactory for the courts to recognize frankly that recovery by the wife or child represents a limitation on the immunity of the spendthrift trust.[9] Such a view has been adopted by the American Law Institute,[10] and a square holding by the courts to that effect seems preferable. It seems quite clear that the policy behind protecting the beneficiary against his own improvidence by preventing ordinary creditors, who have voluntarily extended credit to him, from recovering,[11] should not transcend the elemental or social obligation of the beneficiary to his wife or children for alimony or support.[12] However, the dependents of the beneficiary should only be able to reach so much of the income of the spendthrift trust as under the circumstances may appear reasonable, for the reason, that the beneficiary in turn should not be left destitute.[13]

Upon the question of whether a trust can be drawn with provisions which will exclude the wife or child, Griswold states: "It seems probable . . . that *Moorehead's Estate* indicates that the interest of the beneficiary cannot be exempted from the claim of his wife or child for support." GRISWOLD, *op. cit. supra* note 4, § 335. See also I SCOTT, *op. cit. supra* note 4, § 157.1.

The American Law Institute disregarded, and properly so, the question of the settlor's intent, and made recovery by the wife or child an exception to the immunity of a spendthrift trust: RESTATEMENT, TRUSTS (1935) § 157: "Although a trust is a spendthrift trust or a trust for support, the interest of the beneficiary can be reached in satisfaction of an enforceable claim against the beneficiary, (a) by the wife or child of the beneficiary for support, or by the wife for alimony; . . ."; RESTATEMENT, TRUSTS (Tent. Draft No. 2, 1931) § 153 (a).

The statutory trend is indicated by statutes in three states which permit the wife or children of the beneficiary of a spendthrift trust to reach his interest: La. Laws 1938, No. 81, p. 214; MO. STAT. ANN. (1932) § 569; PA. STAT. ANN. (Purdon, 1930) tit. 18, § 1252; *id.* at tit. 20, § 243; *id.* at tit. 48, § 136. With respect to Pennsylvania, see RESTATEMENT, TRUSTS, PA. ANNOT. (1939) § 157.

8. (1936) 50 HARV. L. REV. 143, 144.

9. "Hitherto the strictness of this trust device has not been relaxed except in certain situations where unusually meritorious creditors have been favored, as for example, the beneficiary's wife and children claiming support. . . . Although some courts rationalize these instances by extending the terms of the trust, it is more logical to treat them as exceptions to the general rule." (1939) 88 U. OF PA. L. REV. 124, 125.

10. RESTATEMENT, TRUSTS (1935) § 157. See note 7 *supra*.

11. I SCOTT, *op. cit. supra* note 4, § 157.1, at 790.

12. Although the policy argument is not as strong in favor of a divorced wife, as a deserted wife, the argument has full force and effect, and should prevail without question in the case of the support and maintenance of the beneficiary's children, whether the mother is divorced or not.

13. I SCOTT, *op. cit. supra* note 4, § 157.1, at 791, 792. Support for this view is found in Bucknam v. Bucknam, 200 N. E. 918 (Mass. 1936).